89-621

Supreme Court, U.S.
FILED
OCT 12
JOSEPH F. SPANIOL
CLERK

No._____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1989

BOB MARTINEZ, et al.,

Petitioners,

v.

JEFFREY RASKE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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3HPP

QUESTIONS PRESENTED

1. Does the statutory amendment to Section 944.275, Florida Statutes (1983), reducing the number of days of discretionary gaintime available from a potential of 37 days to a potential of 20 days, violates the ex post facto prohibition of the federal constitution as applied to a prisoner who had been convicted of an offense occurring prior to the effective date, where the award of gain time is discretionary and conditioned upon factors other than good behavior and where the underlying purpose of the statutory provision is administrative rather than penal.

2. Do the prohibitions of the ex post facto clause of the United States Constitution extend to matters of a state's prison administration which utilize gain time awards to accomplish administrative goals.

PARTIES TO THE PROCEEDINGS BELOW

The following is a list of all parties appearing in the proceedings before the United States Court of Appeals for the Eleventh Circuit who are petitioners or respondents before this Court:

Petitioners

Bob Martinez, Governor,
State of Florida

Richard L. Dugger, Secretary,
Florida Department of
Corrections

Respondent

Jeffrey Raske, a prisoner in
the custody of the Florida
Department of Corrections

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No._____

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JEFFREY RASKE,

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Petitioners, Bob Martinez, Governor of Florida, and Richard L. Dugger, Secretary of the Florida Department of Corrections, petition this Court for a writ of certiorari to review a judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The July 11, 1989, decision of the United States Court of Appeals for the Eleventh Circuit affirming the district court is reported at 876 F.2d 1496 (11th Cir. 1989). (App. A-1.)

The opinion and judgment of the United States District Court for the Middle District of Florida is not reported. (App. A-28.)

JURISDICTION

The decision of the court of appeals was entered on July 11, 1989. This petition has been filed and docketed within the period established by the Supreme Court Rule 20 and 28 U.S.C. 2101(c).

This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved are:

United States Constitution
Article I, Section 10

Section 944.275,
Florida Statutes (1983)

Section 944.275,
Florida Statutes (1981)

The pertinent text of the foregoing constitutional provisions and statutes is reproduced in the appendix.

STATEMENT OF THE CASE

The facts pertinent to consideration of this petition appear in the decision of the circuit court.

The respondent, Jeffrey Raske, is an inmate in the Florida prison system, presently serving three concurrent twenty-five year prison sentences imposed by the

circuit court of Broward County, Florida, for a series of robberies that occurred in 1982. At the time of Raske's offenses, Florida law provided the following formula for the calculation of gain time:

> (1) The [Department of Corrections] shall grant the following deductions for gain-time on a monthly basis, as earned, from the sentences of every prisoner who has committed no infraction of the rules of the department or of the laws of the state and who has performed in a satisfactory and acceptable manner the work, duties, and tasks assigned, as follows:
>
> (a) Three days per month off the first and second years of the sentence;
>
> (b) Six days per month off the third and fourth years of the sentence; and
>
> (c) Nine days per month off the fifth and all succeeding years of the sentence. . . .
>
> . . . .

(2)(b) The department is authorized to grant additional gain-time allowances on a monthly basis, as earned, up to 1 day for each day of productive or institutional labor performed by any prisoner who has committed no infraction of the rules of the department or of the laws of this state and who has accomplished, in a satisfactory and acceptable manner, the work, duties, and tasks assigned. Such gain-time allowances under this section shall be awarded on the basis of diligence of the inmate, the quality and quantity of work performed, and the skill required for performance of the work.

. . . .

(3)(a) An inmate who faithfully performs the assignments given to him in a conscientious manner over and above that which may normally be expected of him, against whom no disciplinary report has been filed within the preceding 6 months, and whose conduct, personal adjustment, and individual effort toward his own rehabilitation show his desire to be a better than average inmate or who diligently participates in an approved course of academic or vocational study may be

> granted, on an individual basis, from 1 to 6 days per month extra gain-time to be deducted from the term of his sentence.

Ch. 304, §1, 1978 Fla. Laws 870, 870-71, codified, as amended, at Fla. Stat. §944.275(1), (2)(a), (3)(a) (1979-1981).

In 1983, the Florida legislature amended section 944.275 to provide as follows:

> (1) The [department] is authorized to grant deductions from sentence in the form of gain-time to encourage satisfactory prisoner behavior, to provide incentive for prisoners to participate in productive activities and to reward prisoners who perform outstanding deeds or services.
>
> . . . .
>
> (4)(a) As a means of encouraging satisfactory behavior, the department shall grant basic gain-time at the rate of 10 days for each monthy of each sentence imposed on a prisoner. . . .

> (b) For each month a prisoner works diligently . . . the department may grant up to 20 days of incentive gain-time, which shall be credited and applied monthly.

Ch. 131, §8, 1983 Fla. Laws 442, 442-43, codified at Fla. Stat. 944.275(1), (4)(a)-(b) (1983).

The 1983 revisions to the gain time statute increased the amount of basic gain time inmates were to be awarded for general good behavior from a three/six/nine day variable rate to ten days per month; the potential incentive gain time available to prisoners, however, decreased from thirty-seven to twenty days per month.

The Florida Department of Corrections has applied the method of awarding incentive gain time adopted in 1983 to all inmates, including those convicted prior to the 1983 enactment.

Raske sought a writ of habeas corpus, claiming that the 1983 statute which

altered the amount and calculation of gain time constituted an ex post facto law as applied to prisoners such as himself who were convicted of offenses that occurred prior to the statute's passage. The district court granted the writ. (App. A-28.) Relying primarily on this Court's decision in Weaver v. Graham, 450 U.S. 24 (1981), the district court found that the 1983 statute substantially altered the consequences attached to a crime already completed by changing the quantum of punishment. (App. A-38.) The district court rejected the Department's argument that the potential for earning work (incentive) gain time was speculative and, therefore, did not affect the quantum of punishment which can be assessed at the time a crime is committed. (App. A-40, 41.) The district court further specifically declared that the procedures

for awarding work (incentive) gain time were no more discretionary than the procedures for awarding automatic gain time in Weaver v Graham, supra. (App. A-41, 42.)

A panel of the court of appeals affirmed the district court decision. Raske v. Martinez, 876 F.2d 1496 (11th Cir. 1989). (App. A-1.) The appeals court, like the district court, found the principles announced in Weaver v. Graham, supra, to be controlling. Raske, 876 F.2d at 1498. (App. A-9.) Relying on dicta in Weaver specifically directed to the nature and purpose of extra gain time, the State of Florida raised several arguments to distinguish between the automatic (basic) gain time addressed in Weaver and the discretionary work (incentive) gain time at issued in Raske. Id. at 1499. (App. A-11-21.) Specifically noting that the Weaver

court observed that the award of extra gain time is "purely discretionary", Weaver, 450 U.S. at. 35, the State of Florida argued that the award of such gain time is too speculative to substantially affect the quantum of punishment which can be assessed at the time a crime is committed and thus cannot satisfy the second prong of the Weaver test. The appeals court conceded that a prisoner may be less likely to earn work (incentive) gain time than automatic (basic) gain time and further that a prisoner who performs his duties only in an adequate manner may indeed be better off under the 1983 act. Raske, 876 F.2d at 1500, 1501. (App. A-19, 23.) Nevertheless, the circuit court determined that even though a prisoner may diligently perform his assigned duties so as to earn the full thirty-seven days previously available, the elimination of the

opportunity to do so is sufficient to make the 1983 amendments ex post facto as applied to Raske. Id. at 1500. (App. A-21-21.)

The State of Florida also contended that the underlying purpose of incentive or work gain time is not punitive or penal in nature and, therefore, outside the prohibitions of the ex post facto clause. The appeals court did not address this argument.

REASONS FOR GRANTING THE WRIT

The Eleventh Circuit Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court. The initial question before the Court is whether the 1983 amendment of Florida Statute 944.275, reducing work or incentive gain time from a potential of 37 days per month to a potental of 20 days, violates the ex post facto prohibition of the federal constitution as applied to a prisoner who had been convicted prior to the effective date, where the award of gain time is discretionary and conditioned upon factors other than good behavior and where the underlying purpose of the statutory provision is administrative rather than penal. However, the Petitioners suggest that the ultimate question before this Court, and the one which should be settled,

is whether the ex post facto prohibition of the United States Constitution extends to matters of prison administration which are accomplished through the discretionary award of gaintime. If so, then the ability for Florida (and other states) to effectively administer the burgeoning prison population will be eroded in that legislative and departmental mechanisms designed to motivate, manage, rehabilitate, or control the ever-expanding population will be constrained merely because they are predicated upon awards which reduce prison time.

The framers of the Constitution considered the ex post facto prohibition so important that it appears twice -- once in Article I, Section 9, forbidding the Congress from passing any ex post facto law, and again in Article I, Section 10, placing the same limitation upon the

states. Obviously, the framers, in their providence and not far removed from the excesses of tyranny, included the ex post facto clauses as an added precaution to future oppression. However, as noted by Justice Chase in Calder v. Bull, 3 U.S. (3 Dall.) 386, 390 (1798), the seminal case in ex post facto analysis:

> The prohibition, "that no state shall pass any **ex post facto** law," necessarily requires some explanation; for, naked and without explanation, it is unintelligible, and means nothing.

Justice Chase went on to state what laws he considered to be ex post facto laws, "within the words and the intent of the prohibition":

> 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime or makes it greater than it was, when committed. 3d. Every law that changes the

> punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offense, in order to convict the offender.

Id. at 390.

There is no doubt that one of the objectives underlying the ex post facto prohibitions is to provide fair notice and to foster governmental restraint when a legislature increases punishment beyond what was prescribed when the crime was consummated. Calder v. Bull, 3 U.S. (3 Dall) at 387-388; Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 138 (1810); Dobbert v. Florida, 432 U.S. 282, 298 (1977); Weaver v. Graham, 450 U.S. 24, 28-29 (1981); Miller v. Florida, 482 U.S.____, 107 S.Ct. 2446 (1987). The Raske court holds that the 1983 amendment to Section 944.275,

Florida Statutes, lowering the potential to earn additional gaintime for labor performed, violates the third prohibition enumerated by Justice Chase -- that is, the reduced availability of incentive gaintime somehow changes the "punishment", and inflicts a greater "punishment" than provided for at the time Petitioner committed his crime. The logical inquiry which follows is "What constitutes 'punishment'?".

In Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69, 83 S.Ct. 554, 567-68, 9 L.Ed.2d 644 (1963), this Court described the standards traditionally applied to determine whether a statute is punitive or penal in nature:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation

> will promote the traditional aims of punishment--retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions.

Id. (Emphasis in original.)

The underlying purpose of the incentive or work gain time provision is to encourage positive and rehabilitative behavior. It is used as a daily management tool by prison officials. Unlike automatic or basic gaintime, incentive gaintime does not automatically attach and incorporate itself as an integral part of a prisoner's sentence at the time the offense occurs. Rather, it is contingent upon the wishes of correctional authorities and the special affirmative behavior of the prisoner once

he is within the prison walls. Indeed, if the underlying purposes of the provisions governing the awards of basic and incentive gain time were not separate and distinct, and utilized to achieve different goals, there would be no need for the Florida Legislature to have enacted separate gain time provisions.

In Dobbert v. Florida, 432 U.S. 282, 293, 97 S.Ct. 2290, 2298, 53 L.Ed.2d 344 (1977), this Court held that the prohibition of ex post facto laws does not extend to every change of law that "may work to the disadvantage of a defendant."

> It is intended to secure "substantial personal rights" from retroactive deprivation and does not "limit the legislative control of remedies and modes of procedure which do not affect matters of substance."

Portley v. Grossman, 444 U.S. 1311, 1312, 100 S.Ct. 714, 715 (1980), citing Dobbert, supra.

> The critical question, as Florida has often acknowledged, is whether the new provision imposes greater punishment after the commission of the offense, not merely whether it increases a criminal sentence.

Weaver, 450 U.S. at 32, n.17, citations omitted.

The incentive gaintime provision does not impose a greater punishment on a prisoner after the commission of his offense. Indeed, it does not increase his original sentence at all. Instead, the provision merely affords a prisoner an opportunity to reduce his prison time if he is willing to exert additional, affirmative behavior. However, because the award of incentive gaintime is purely discretionary and because it is contingent on the availability of a work assignment, the wishes of correctional authorities and the special behavior of the prisoner, incentive

gaintime can be viewed as no more than a "mere expectancy". The fact that the 1983 amendment to Section 944.275 diminished the potential benefits accruing to that expectancy, if and when the expectancy became reality, does not create an ex post facto violation. Indeed, the speculative nature of incentive gaintime was readily recognized by this Court in Weaver, supra, when it treated the ameliorative provisions increasing the availability of discretionary gaintime as incapable of offsetting the reduced awards of basic gaintime. Weaver, 450 U.S. at 35. It thus appears from the Weaver decision, that this Court did not believe discretionary gaintime to be a **determinant** of a prisoner's term of incarceration which could "substantially alter the consequences attached to a crime already completed." 450 U.S. at 32-35.

The Eleventh Circuit Court of Appeals has rejected the arguments which have been presented above. In short, the Eleventh Circuit has refused to recognize a distinction between the nature and purpose of automatic (basic) and work (incentive) gaintimes. While conceding that incentive gaintime is discretionary in a limited sense and that a prisoner may be less likely to earn incentive gaintime than basic gaintime, the Raske court has concluded that the Weaver decision limits the ex post facto examination solely to whether a prisoner is "disadvantaged by the reduced opportunity to shorten his time in prison." Raske, 876 F.2d at 1500, citing to Weaver v. Graham, 450 U.S. 24, 33-34, 101 S.Ct. 960, 966-967 (emphasis in original). However, if the sole determinant for the purposes of ex post facto analysis is the ability or

opportunity for a prisoner to shorten his prison term, then no legislative enactment which effectively reduces a prisoner's term of incarceration, even if solely for the purpose of prison administration, and which is later changed to restrict or eliminate that opportunity, could withstand ex post facto scrutiny.

For example, the State of Florida has enacted a number of early release statutes which provide mechanisms for early release through the award of gain time or credits. See Fla. Stat. 944.276 (1987); Fla. Stat. 944.277 (1988 Supp.). In Blankenship v. Dugger, 521 So.2d 1097 (Fla. 1988), the Florida Supreme Court considered whether changes in the early release statutes enacted for the purpose of alleviating prison overcrowding ran afoul of the ex post facto clause of the Constitution. In Blankenship, the Florida

Supreme Court distinguished between the nature and purpose of administrative gain time awarded for early release and the basic or automatic gain time which was considered in Weaver. The Florida Supreme Court concluded that early release statute enacted to modify eligibility for the early release awards was not an invalid ex post facto law. Blankenship, 521 So.2d at 1099. However, under the analysis presented in Raske, any changes in eligibility for administrative gain time would necessarily disadvantage the excluded prisoner by removing his potential for early release and thus fall within the prohibitions of the ex post facto clause. This issue has now reached this Court in Woolworth v. Dugger, Docket No. 88-6976, in which a Petition for Writ of Certiorari is pending consideration. The time appears ripe to address to what extent the ex post

facto clause should extend into matters of prison administration.

For the reasons cited above, Petitioners submit that the decision in Raske impermissibly expands the prohibitions of the ex post facto clause beyond its intent and purpose. This is not to suggest that the decision in Weaver is erroneous; however, the Weaver decision is, as described by some members of that court, "a close one". Weaver, 450 U.S. at 36-38, concurring opinions of Blackmun, J., Burger, C.J., and Rehnquist, J. Certainly, the framers of the Constitution did not intend for the ex post facto prohibitions to prevent a state from effectively managing its prison system. Indeed, it is unlikely the framers, in all of their providence, could have forseen the special problems inherent in managing the prison systems of today. Unfortunately, there are

few tools available by which the states and the state correctional systems may accomplish this goal. The award of various forms of gaintime is one such tool. Petitioners submit that the statutory provisions governing the award of the various types of gaintime must be scrutinized carefully to determine whether, under the standards illuminated in Kennedy v. Mendoza-Martinez, supra, the statute is truly punitive or penal in nature rather than a matter of prison administration. If the latter, then the prohibitions of the ex post facto clause should not apply.

As noted in Calder v. Bull, 3 U.S. (3 Dall.) 386, 390 (1798), "[t]he prohibition, 'that no state shall pass any ex post facto law,' necessarily requires some explanation. . . ." While the definitions of "ex post facto law" have evolved over the years, they are far from precise.

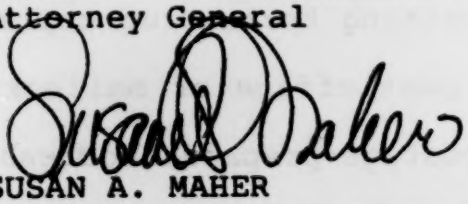
Petitioners submit that the Raske decision now extends the prohibitions of the ex post facto clause beyond that contemplated by the framers when they included the prohibition in the Constitution. Petitioners further suggest that the time is ripe to refine the definition of ex post facto law with regard to matters which are purely related to prison administration.

CONCLUSION

For these various reasons, the petition for certiorari should be granted.

Respectfully submitted,

ROBERT A . BUTTERWORTH
Attorney General



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Petition for Writ of Certiorari was served in accordance with Rule 28.1 of the Rules of the Supreme Court of the United States by depositing three true copies in a United States post office or mailbox, with first-class postage prepaid, addressed to:

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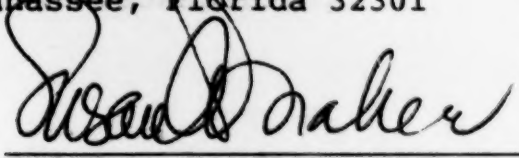

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